

1 HONORABLE RICARDO S. MARTINEZ  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 NATHAN CAMPOS,  
11 Plaintiff,  
12 v.  
13 BIG FISH GAMES, INC., a Washington  
corporation, et al.,  
14 Defendant.

Case No. 2:22-cv-01806 RSM

15 AGREEMENT REGARDING  
DISCOVERY OF ELECTRONICALLY  
STORED INFORMATION

16 STIPULATED MOTION AND ORDER

17 NOTE ON MOTION CALENDAR:  
JUNE 8, 2023

18 The parties hereby stipulate to the following provisions regarding the discovery of  
19 electronically stored information (“ESI”) in this matter and move for entry of an order:

20 **A. General Principles**

21 1. An attorney’s zealous representation of a client is not compromised by conducting  
discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate  
in facilitating and reasonably limiting discovery requests and responses raises litigation costs and  
contributes to the risk of sanctions.

22 2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.  
26(b)(1) must be applied in each case when formulating a discovery plan. To further the application  
of the proportionality standard in discovery, requests for production of ESI and related responses  
should be reasonably targeted, clear, and as specific as possible.

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1      **B. ESI Disclosures**

2      Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each  
 3 party shall disclose:

4      1.      Custodians. The five custodians for each game (Big Fish Casino and Jackpot Magic  
 5 Slots) most likely to have discoverable ESI in their possession, custody, or control. The custodians  
 6 shall be identified by name, title, connection to the instant litigation, and the type of the information  
 7 under the custodian's control.

8      2.      Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared  
 9 drives, servers), if any, likely to contain discoverable ESI.

10     3.      Third-Party Data Sources. A list of third-party data sources, if any, likely to contain  
 11 discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud storage) and,  
 12 for each such source, the extent to which a party is (or is not) able to preserve information stored  
 13 in the third-party data source.

14     4.      Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
 15 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the  
 16 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

17     5.      Foreign data privacy laws. Nothing in this Order is intended to prevent either party  
 18 from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the European  
 19 Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree to meet  
 20 and confer before including custodians or data sources subject to such laws in any ESI or other  
 21 discovery request.

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1       **C. ESI Discovery Procedures**

2       1.       On-site inspection of electronic media. Such an inspection shall not be required  
 3 absent a demonstration by the requesting party of specific need and good cause or by agreement  
 4 of the parties.

5       2.       Search methodology. The parties shall timely confer to attempt to reach agreement  
 6 on appropriate search terms and queries, file type and date restrictions, data sources (including  
 7 custodians), and other appropriate computer- or technology-aided methodologies, before any such  
 8 effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the  
 9 search methodology.

10      a.       Prior to running searches:

11       i.       The producing party shall disclose the data sources (including  
 12 custodians), search terms and queries, any file type and date restrictions, and any other  
 13 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable  
 14 information. The producing party may provide unique hit counts for each search query.

15       ii.       After disclosure, the parties will engage in a meet and confer process  
 16 regarding additional terms sought by the non-producing party.

17       iii.       The following provisions apply to search terms / queries of the  
 18 requesting party. Focused terms and queries should be employed; broad terms or queries, such as  
 19 product and company names, generally should be avoided. A conjunctive combination of multiple  
 20 words or phrases (*e.g.*, “computer” and “system”) narrows the search and shall count as a single  
 21 search term. A disjunctive combination of multiple words or phrases (*e.g.*, “computer” or  
 22 “system”) broadens the search, and thus each word or phrase shall count as a separate search term  
 23 unless they are variants of the same word. The producing party may identify each search term or  
 24 query returning overbroad results demonstrating the overbroad results and a counter proposal  
 25 correcting the overbroad search or query.

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1           3. Format.

2           a. ESI will be produced to the requesting party with searchable text, in a  
 3 format to be decided between the parties. Acceptable formats include, but are not limited to, native  
 4 files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only  
 5 with load files for e-discovery software that includes metadata fields identifying natural document  
 6 breaks and also includes companion OCR and/or extracted text files), and searchable PDF.

7           b. Unless otherwise agreed to by the parties, files that are not easily converted  
 8 to image format, such as spreadsheet, database, and drawing files, will be produced in native  
 9 format.

10          c. Each document image file shall be named with a unique number (Bates  
 11 Number). File names should not be more than twenty characters long or contain spaces. When a  
 12 text-searchable image file is produced, the producing party must preserve the integrity of the  
 13 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,  
 14 the revision history.

15          d. If a document is more than one page, the unitization of the document and  
 16 any attachments and/or affixed notes shall be maintained as they existed in the original document.

17          e. The parties shall produce their information in the following format: single-  
 18 page images and associated multi-page text files containing extracted text or with appropriate  
 19 software load files containing all information required by the litigation support system used by the  
 20 receiving party.

21          4. De-duplication. The parties may de-duplicate their ESI production across custodial  
 22 and non-custodial data sources after disclosure to the requesting party.

23          5. Email Threading. The parties may use analytics technology to identify email  
 24 threads and need only produce the unique most inclusive copy and related family members and  
 25 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce a  
 26 less inclusive copy.

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1       6. Metadata fields. If the requesting party seeks metadata, the parties agree that only  
 2 the following metadata fields need be produced, and only to the extent it is reasonably accessible  
 3 and non-privileged: document type; custodian and duplicate custodians (or storage location if no  
 4 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;  
 5 file extension; original file path; date and time created, sent, modified and/or received; and hash  
 6 value. The list of metadata type is intended to be flexible and may be changed by agreement of the  
 7 parties, particularly in light of advances and changes in technology, vendor, and business practices.

8 **D. Preservation of ESI**

9       The parties acknowledge that they have a common law obligation, as expressed in Fed. R.  
 10 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in the  
 11 party's possession, custody, or control. With respect to preservation of ESI, the parties agree as  
 12 follows:

13       1. Absent a showing of good cause by the requesting party, the parties shall not be  
 14 required to modify the procedures used by them in the ordinary course of business to back-up and  
 15 archive data; provided, however, that the parties shall preserve all discoverable ESI in their  
 16 possession, custody, or control.

17       2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.  
 18 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure  
 19 where that data is created after a disclosure or response is made (unless excluded under Sections  
 20 (D)(3) or (E)(1)-(2)).

21       3. Absent a showing of good cause by the requesting party, the following categories  
 22 of ESI need not be preserved:<sup>1</sup>

24       1 The omission of any category of ESI from the above-enumerated list shall not be construed to  
 25 impose on any party an affirmative obligation to preserve ESI beyond those obligations required  
 26 by law, including the Federal Rules of Civil Procedure. Nor shall such omission require any  
 party to affirmatively implement preservation measures not used in the ordinary course of  
 business and that would impose an undue burden on the preserving party.

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- 1 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 2 b. Random access memory (RAM), temporary files, or other ephemeral data  
3 that are difficult to preserve without disabling the operating system.
- 4 c. On-line access data such as temporary internet files, history, cache,  
5 cookies, and the like.
- 6 d. Data in metadata fields that are frequently updated automatically, such as  
7 last-opened dates (see also Section (E)(5)).
- 8 e. Back-up data that are duplicative of data that are more accessible  
9 elsewhere.
- 10 f. Server, system or network logs.
- 11 g. Data remaining from systems no longer in use that is unintelligible on the  
12 systems in use.
- 13 h. Electronic data (e.g., email, calendars, contact data, and notes) sent to or  
14 from mobile devices (e.g., iPhone, iPad, Android devices), provided that  
15 a copy of all such electronic data is automatically saved in real time  
16 elsewhere (such as on a server, laptop, desktop computer, or “cloud”  
17 storage).
- 18 i. Text messages.
- 19 j. Dynamic fields of databases or log files that are not retained in the usual  
20 course of business and that would require extraordinary affirmative  
21 measures to preserve.
- 22 k. Automatically saved versions of files (e.g., Microsoft Office documents  
23 and emails) that are not retained in the usual course of business and that  
24 would require unduly burdensome affirmative measures to preserve.

25 **E. Privilege**

26 1. A producing party shall create a privilege log of all documents fully withheld from  
2 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this  
3 Agreement and Order. Privilege logs shall include a unique identification number for each  
4 document and the basis for the claim (attorney-client privileged or work-product protection). For  
5 ESI, the privilege log may be generated using available metadata, including author/recipient or

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1 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata  
 2 provide insufficient information for the purpose of evaluating the privilege claim asserted, the  
 3 producing party shall include such additional information as required by the Federal Rules of  
 4 Civil Procedure. Privilege logs will be produced to all other parties no later than 30 days before  
 5 the deadline for filing motions related to discovery unless an earlier deadline is agreed to by the  
 6 parties.

7       2. Redactions need not be logged so long as the basis for the redaction is clear on the  
 8 redacted document.

9       3. With respect to privileged or work-product information generated after the filing  
 10 of the complaint, parties are not required to include any such information in privilege logs.

11      4. Activities undertaken in compliance with the duty to preserve information are  
 12 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

13      5. Pursuant to Fed. R. Evid. 502(d), the production of any documents, electronically  
 14 stored information (ESI) or information, whether inadvertent or otherwise, in this proceeding  
 15 shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute  
 16 a waiver by the producing party of any privilege applicable to those documents, including the  
 17 attorney-client privilege, attorney work-product protection, or any other privilege or protection  
 18 recognized by law. This Order shall be interpreted to provide the maximum protection allowed  
 19 by Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Nothing contained  
 20 herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI  
 21 or information (including metadata) for relevance, responsiveness and/or segregation of  
 22 privileged and/or protected information before production. Information produced in discovery  
 23 that is protected as privileged or work product shall be immediately returned to the producing  
 24 party.

25      6. The entry of this ESI Order does not, on its own, obligate Defendant to produce  
 26 software code, software components, game logic, operating systems, algorithms or other means

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1 for computation or operation of a game or gaming platform, which shall be subject to separate  
2 discovery requests and the terms of a separate protocol entered or to be entered in this matter,  
3 with all objections reserved.

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5 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

6 DATED: June 8, 2023

/s/ Andrew Ryan

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15 DATED: June 8, 2023

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## ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED this 12<sup>th</sup> day of June, 2023.

B. M. S.

RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE

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